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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 595

ESTATE OF ANNIE PRESTON BASSETT, DECEASED,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 27-39) are unreported. The opinion of the Court of Appeals (R. 165-167) is reported in 170 F. 2d 916.

JURISDICTION

The judgment of the Court of Appeals was entered November 29, 1948. (R. 168-169.) The peti-

tion for a writ of certiorari was filed February 24, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether gifts made by the decedent within two years of her death were transfers made in contemplation of death within the meaning of Section 811(c) of the Internal Revenue Code and should be included in the decedent's gross estate.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations involved are set forth in the Appendix, *infra,* pp. 10-13.

STATEMENT

The facts as found by the Tax Court (R. 27-33) may be summarized as follows:

Annie Preston Bassett was born May 12, 1865. She died testate January 22, 1942, leaving her husband, Edward M. Bassett, executor of her estate, and five children and 15 grandchildren. During the married life of decedent and her husband the latter, who was a practicing lawyer, had divided his income with his wife in such a way that their income from investments was about equal. (R. 27-28.)

In 1920 decedent and her husband began making gifts to their children. These gifts, so far as decedent was concerned, began on December 15, 1922, and a tabulation of these gifts up through March 1, 1932, with the amounts as evaluated by decedent's

husband appears in the record. (R. 28.) Decedent made no gifts from March 1, 1932, to March 1, 1940. (R. 29.)

Decedent was the daughter of a Presbyterian minister, was a graduate of Wellesley and had taught school for a number of years. She was active in literary societies, and also in the work of her church, the work of the Young Women's League and in the Red Cross. She had traveled extensively and was a very earnest reader on all subjects of general interest and matters pertaining to health. She frequently prepared papers to be presented before groups. (R. 29.)

On November 25, 1938, decedent made a will in which she bequeathed her real estate, household goods and belongings to her husband and her residuary estate to her five children share and share alike or the heir of each child *per stirpes*. In less than two weeks thereafter she informed her husband that she had discovered a lump in her right breast. Her husband took her at once to a surgeon and the lump was diagnosed as a scirrhus carcinoma. This cancer had been six months in formation prior to the operation and had been perceptible for two months prior thereto. The officiating surgeon operated the next day but did not inform decedent of the nature of her illness, although the patient asked him if he thought she had a cancer. Following the operation a number of X-ray treatments were given the patient but the wound healed with-

out any complications and there was no evidence of a recurrence of the cancerous condition in any other locality at that time. (R. 29.)

In the early part of 1941 a cough, which decedent had been experiencing for some time prior thereto, developed so that she again visited her surgeon on January 23, and on May 12, 1941. On May 16, 1941, an X-ray picture of the lung which was taken indicated to the surgeon the probable existence of a cancer in that organ. X-ray treatments were immediately renewed and continued for several months. On December 9, 1941, an X-ray photograph was made which showed the definite existence of a cancer in the right lung. The surgeon informed decedent's daughter of his suspicions after the first X-ray picture was taken in May. In the latter part of 1941 pneumonia developed and the general condition of the decedent became progressively worse. In December she realized she was not getting well, although she gave no evidence of being in fear of imminent death and laid plans which provided for her continued existence during the year 1942. (R. 30.)

On March 1, 1940, decedent again initiated the disposition of her property through gifts, the last series of which were made on January 12, 1942, ten days before her death. These gifts as evaluated by decedent's husband amounted to $210,487 and consisted of mortgages, bonds and cash. The gifts were made to decedent's five children, 15

grandchildren, two sons-in-law and two daughters-in-law. (R. 30-31.)

The certificate of decedent's death gives the primary cause as carcinoma of the lungs existing for ten months and the contributory cause thereof as chronic myocarditis which existed for one year. (R. 33.)

The Tax Court held that the gifts made by the decedent during 1941 and 1942 were made in contemplation of death and as a substitute for testamentary disposition. Accordingly it decided that the amount of such gifts must be included in the gross estate. (R. 39.)

The decision of the Tax Court on the only issue involved here was affirmed by the Court of Appeals. (R. 167.)

ARGUMENT

The only question here is whether the gifts which the decedent made in 1941 and 1942 were in contemplation of death and therefore includible in the gross estate under Section 811(c) of the Internal Revenue Code (Appendix, *infra*).

This Court has held that, although death may not be considered imminent, a transfer is made in contemplation of death if the thought of death is the dominant or impelling motive. *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630; *City Bank Co.* v. *McGowan,* 323 U. S. 594, 599; *United States* v. *Wells,* 283 U. S. 102, 116-117. Accordingly the test is to be found in motive and the question as to what

has been the dominant motive of a decedent is one of fact. *Colorado Bank* v. *Commissioner,* 305 U. S. 23; *United States* v. *Wells, supra.*

Certainly there is ample evidence here to support the Tax Court's conclusion that the gifts in question were made in contemplation of death, without the necessity of resorting to the statutory presumption. Hence its finding should be accepted here. *Allen* v. *Trust Co. of Georgia, supra; United States* v. *O'Donnell,* 303 U. S. 501, 508.

It is true that the Court of Appeals stated that the statutory presumption had not been overcome in the conjunctive with its ruling that the Tax Court's finding was not clearly erroneous. Nevertheless, the Tax Court's conclusion that the gifts made in 1941 and 1942 were made in contemplation of death and as a substitute for testamentary disposition was based not upon the statutory presumption but upon the record as a whole. This is made clear by the fact that gifts made by the decedent on March 1, 1940, though within two years from the date of decedent's death, were not included in the Tax Court's finding.

The decedent was an intelligent and well-educated woman who was nearly 77 years of age at the time of her death. During the last two years of her life she made gifts of over $210,000 and died with an estate reported at less than $10,000 subject to tax. (R. 38.)

Decedent had made gifts from 1922 to 1932 which are not involved here. As the Tax Court points out, after discontinuing all gifts for over eight years decedent's donative activities were suddenly revived on March 1, 1940. In the meantime, in 1938, decedent had developed a cancer in her breast. Her breast had been amputated, and on December 9, 1938, she had asked her physician whether or not he had removed a cancer. She received no reply, but did receive X-ray treatments. Just prior to her operation she had made her will.

On January 23, 1941, she had again consulted her physician, an X-ray picture had been taken which was again immediately followed by X-ray treatments. The doctor informed decedent's daughter that decedent might have a cancer of the lung. With an uncontrollable cough, and while taking X-ray treatments, the decedent "became inordinately energetic in the disposition of her resources." (R. 30, 38.) She made gifts of approximately $12,000 to each of her five children. Shortly thereafter she gave $60,000 to her fifteen grandchildren, and then approximately $16,000 to her four daughters-in-law and sons-in-law; and finally within ten days from the date of her death she gave over $30,000 equally divided among four of her children and their spouses.

From the above it is readily seen that there is no necessity for the application of the statutory pre-

sumption. Section 811(c) of the Internal Revenue code requires the inclusion for estate tax purposes of any property which the decedent has at any time made transfer in contemplation of death. The same section also provides:

> Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death * * * shall, unless shown to the contrary, be deemed to have been made in contemplation of death * * *.

We submit that the Court of Appeals was correct in ruling that while none of the separate gifts here was a material part of decedent's property, yet as the gifts aggregated over half of her estate, the statutory presumption applies. Any other interpretation of the statute would defeat its purpose, and one could dispose of his entire estate without fear of presumption, merely by making a number of small transfers, even though they were made to the same person.

The petitioner contends for the first time in this Court that any transfer of less than $5,000 though made in contemplation of death "must be excluded from the point of view both of convenience and purposes in view." (Pet. Br. 18.) Not having raised the question below, it is not entitled to have it decided here. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380. In any event, we submit that the petitioner's contention is without merit.

It is true that the Regulations provide that all transfers of an amount of $5,000 or more must be disclosed in the estate tax return. Regulations 105, Articles 81.15, 81.16 (Appendix, *infra*). It is clear that the purpose of the regulation is to eliminate the administrative necessity of examining small isolated gifts. Its purpose is not to exempt series or numerous gifts of small amounts which together aggregate a material part of a decedent's estate.

CONCLUSION

The decision below is correct. It presents no conflict and there is no necessity for further review.

Respectfully submitted,

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MARCH, 1949.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such con-

sideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * *

(26 U. S. C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers in contemplation of death (see section 81.16); * * *

* * * * *

All transfers made by the decedent during his life of an amount of $5,000 or more, except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax, a brief statement of the pertinent facts should be made.

SEC. 81.16 [as amended by T. D. 5248, 1943 Cum. Bull. 1113] *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A trans-

fer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death.

If the executor contends that the value of a transfer of $5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he

considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

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